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In the Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in sustaining a decision of the Interstate Commerce Commission interpreting and applying labor protective conditions imposed by the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 54 F.3d 842. The final order of the Interstate Commerce Commission (Pet. App. 50a-61a) is reported at 9 I.C.C.2d 1127.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on May 19, 1995. The court of appeals denied rehearing on July 21, 1995 (Pet. App. 31a). Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 18, 1995, a Saturday. The peti-

tion was timely filed on Monday, November 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Interstate Commerce Commission (Commission) (now the Surface Transportation Board[1]) has exclusive authority to approve rail mergers and consolidations. 49 U.S.C. 11341-11351 (1988). When the Commission does approve such an application, it is required by law to impose conditions for the protection of employees who are adversely affected by the transaction. 49 U.S.C. 11347 (1988). The Commission has devised a comprehensive set of conditions known as the *New York Dock* conditions[2] to carry out that responsibility. *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 120-121 (1991). Among other things, the *New York Dock* conditions give employees up to six years of monthly displacement allowances to protect against a loss or

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[1] Section 101 of the recently enacted ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, abolished the ICC effective January 1, 1996. Section 201 of that Act (109 Stat. 932) established the Surface Transportation Board; Section 204(c)(2) (109 Stat. 942) provides that the Board shall continue any suit brought by or against the ICC to the extent that the suit involves ICC functions that have been transferred to the Board. This case concerns interpretation of labor protective conditions imposed under former Section 11347, a matter over which the Board has been given jurisdiction under the new Act, § 102(a), 109 Stat. 842 (to be codified at 49 U.S.C. 11326). Citations in this brief are to the statutory provisions as they existed at the time of the conduct at issue.

[2] *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

diminution of wages resulting from a merger or consolidation. *New York Dock*, Article I, § 5(a).

Under *New York Dock*, disputes concerning such matters as an employee's entitlement to displacement allowances and the amount thereof are submitted in the first instance to arbitrators, who act under authority delegated from the Commission. Article I, § 11. Although at one time the Commission had a policy of not reviewing arbitral decisions, in the 1980s the Commission, with court approval, reversed that policy. *Chicago & N.W. Transp. Co.—Abandonment*, 3 I.C.C.2d 729, 732-735 (1987) (*Lace Curtain*), aff'd *sub nom. International Bhd. of Elec. Workers* v. *ICC*, 862 F.2d 330 (D.C. Cir. 1988) (*IBEW*). The Commission generally reviews arbitral decisions only with respect to recurring or otherwise significant issues of general importance. The Commission generally will not reverse an award unless it fails to draw its essence from conditions imposed, was egregiously erroneous, or was outside the scope of the arbitrators' authority. Pet. App. 54a. The Commission will not review issues of causation or fact. *IBEW*, 862 F.2d at 337.

2. CSX Transportation, Inc. (CSXT) was formed as the result of a merger approved by the Commission in 1980 subject to *New York Dock* conditions. Pursuant to that authorization, CSXT announced plans in 1987 to consolidate certain train dispatching operations. Petitioner American Train Dispatchers Association and CSXT reached an agreement under which dispatchers taking jobs at the new consolidated location at Jacksonville, Florida, would undergo training in the carrier's new computerized dispatching system. The training of some dispatchers in Jacksonville created personnel shortages elsewhere,

and the remaining employees consequently logged unusual amounts of overtime during this period. Pet. App. 3a.

As required under Article I, § 5(a), of the *New York Dock* conditions, CSXT computed "test period averages" of the wages of affected dispatchers, upon which any displacement allowances would be based. In making these computations, CSXT deducted the overtime wages it believed attributable to the computer training of other dispatchers. CSXT claimed that the loss of this transaction-related overtime did not need to be compensated under *New York Dock*. Petitioner objected to this computation, and filed a complaint with the Commission. The Commission dismissed the complaint, referring the matter to an arbitrator in the first instance.[3] Pet. App. 3a-4a.

The arbitral panel concluded that CSXT had properly excluded transaction-related overtime when determining the employees' prior "total compensation" under Article I, § 5(a). Pet. App. 79a-80a. The panel noted that the words "average monthly compensation" had previously been interpreted on a case-by-case basis by arbitrators, and that most of the arbitrators had adopted the interpretation urged by CSXT. A contrary interpretation, the panel explained, could give employees a windfall in the form of six years' increased displacement payments, reflecting overtime pay that resulted in the first place from the merger. *Id.* at 80a-81a.

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[3] The union appealed the dismissal, but the United States Court of Appeals for the District of Columbia Circuit dismissed the petition for lack of a final order of the Commission. *American Train Dispatchers Ass'n* v. *ICC*, 949 F.2d 413 (1991). Pet. App. 4a n.2.

On appeal, the Commission acknowledged that because it was reviewing an arbitral panel's legal interpretation of the Commission's labor protective conditions, a "more searching review" than usual was required. Pet. App. 54a. Nevertheless, the Commission affirmed the arbitral panel. *Id.* at 59a. It agreed that literal application of the "total compensation" provision of section 5(a) would foil the basic purpose and overall scheme of *New York Dock* to compensate displaced employees for merger-caused harms. See Pet. App. 59a. The Commission specifically relied upon Article I, § 1(b), of the *New York Dock* conditions, which defines a "[d]isplaced employee" as an employee who "is placed in a worse position with respect to his compensation" as a result of a transaction. *Ibid.*

3. The court of appeals affirmed (Pet. App. 1a-21a), with Judge Wald dissenting (*id.* at 22a-29a). First, the court rejected petitioner's argument that the Commission's decision to remit to arbitration these questions concerning compensation under the Commission's *New York Dock* conditions was an unexplained departure from its existing policy of treating those issues itself. *Id.* at 6a-8a. The court explained that the Commission acknowledged that it had handled such issues itself in the past, but that the Commission had adequately set forth its reasons for now leaving them to an arbitral panel in the first instance. *Id.* at 7a. The Commission had explained that, after the court of appeals had affirmed the Commission's new policy of reserving the authority to review arbitral decisions in appropriate circumstances in 1988 in *Lace Curtain*, it was more comfortable leaving matters to be arbitrated in the first instance.

Next the court considered and rejected petitioner's argument that the Commission erred by ignoring the "plain meaning" of Article I, § 5(a), which provides that compensatory payments should be based on "total compensation" for the last 12 months the employee actually worked. Pet. App. 8a-21a. The court explained that, although viewed in isolation the language of section 5(a) appears clear, that section had to be viewed in the context of the *New York Dock* conditions as a whole. Pet. App. 12a. It agreed with the Commission's analysis that the various conditions of *New York Dock*, when read together, were intended to protect employees only from transaction-related losses. *Ibid.* Specifically, the court noted that section 1(b)

> reflects an intention underlying the conditions to ensure that employees are no worse off * * * after a consolidation than they would be *had the consolidation never taken place.* It is difficult to see how this purpose could be harmonized with the displacement allowance if § 5(a) were given literal effect. In the words of the Commission, "[a]n employee does not lose, 'as a result of the transaction,' that which he would never have had but for the transaction."

Pet. App. 14a.

Judge Wald dissented in part, on the ground that she considered section 5(a) to be clear and unambiguous, and that the Commission was thus compelled to adhere to what she read as its plain meaning. Pet. App. 22a-29a.

ARGUMENT

The decision of the court of appeals is correct, does not involve an issue of general importance, and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is therefore not warranted.

1. Petitioner argues (Pet. 12-14) that the Commission departed from its own precedent by referring certain issues concerning interpretation of its own labor protective conditions, which it had formerly reserved to itself, to arbitration in the first instance. As the court of appeals correctly determined, however, the Commission thoroughly and adequately explained its reasons for leaving more issues to be decided in the first instance through arbitration, with an appeal to the Commission in appropriate circumstances. Pet. App. 6a-8a. Petitioner objects to this result because it expands the role of arbitrators, and is allegedly slower because it requires a two-step process, rather than having the entire matter handled by the Commission from the outset. Petitioner has not shown, however, that the procedure chosen by the Commission is in any way unlawful, or that the Commission's explanation for using it is inadequate. As the D.C. Circuit said in rejecting these same arguments in another case, the Commission's policy should "expedite, rather than 'chill'" the handling of these cases, and judgments about "the value of 'early resolution' and the best method of achieving it are well within the expertise of the Commission." *United Transp. Union* v. *United States*, 905 F.2d 463, 470 (1990) (emphasis omitted).

2. Petitioner next argues (Pet. 15) that the court of appeals erred because it "confuse[d] the standard

for agency interpretation of a statute, with the standard for agency interpretation of its own rules." Petitioner also claims that the court of appeals misquoted *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454 (1989), concerning that issue. Pet. 15-16.[4] But the court of appeals clearly understood that *Public Citizen* was a case about an agency's harmonization of disparate provisions of a statute. The court reasoned, however—as indicated by its use of the words "or regulatory" in brackets (not parentheses, as the petition incorrectly shows, Pet. 16)—that the same principles should apply when an agency is harmonizing provisions of its own rules or regulations. See Pet. App. 13a. Indeed, petitioner has cited no precedent, and we are aware of none, that suggests that an agency is entitled to less deference when interpreting rules it has promulgated than when it is interpreting its statute. To the contrary, "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). As even the dissenting court of appeals judge recognized, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994) (internal quotation marks omitted) (quoted in part at Pet. App. 22a & n.1).

3. At bottom, then, petitioner's contention (Pet. 17) is that this Court should declare one particular provision of the Commission's *New York Dock* conditions to be clear and unambiguous regardless of its

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[4] Petitioner quotes from the slip opinion, which was corrected in the printed version. See 54 F.3d at 849.

context in the overall scheme, and thus controlling here (as the dissenting judge urged). However, numerous arbitral panels have reached conflicting results concerning the provision, and the Commission found it ambiguous. The court of appeals similarly found that in context the provision is ambiguous with respect to the issue presented here; in so holding, the court followed case law that petitioner tries to distinguish as involving a statute rather than agency regulations. Pet. 15 (citing *American Scholastic TV Programming Found.* v. *FCC*, 46 F.3d 1173 (D.C. Cir. 1995), and *Tataranowicz* v. *Sullivan*, 959 F.2d 268, 275-280 (D.C. Cir. 1992), cert. denied, 506 U.S. 1048 (1993)).[5] But as stated above, "deference is even more clearly in order" in the regulatory context. *Udall* v. *Tallman*, 380 U.S. at 16. The Commission acted well within its broad discretion in interpreting its own labor protective conditions when it found that a literal interpretation of section 5(a), as applied to the issue presented here, would conflict with other basic provisions of its labor protective conditions, notably section 1(b).

As the Commission explained, a basic purpose of the *New York Dock* conditions is to compensate "displaced" employees harmed as a result of a merger transaction. Indeed, the conditions define a "[d]isplaced employee" as one who is placed in a *worse* position with respect to his or her compensation as a result of a particular transaction. Article 1, § 1(b). Given that provision, and the basic scheme of the

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[5] Petitioner attempts on similar grounds (Pet. 16-17) to deny the relevance of *McCarthy* v. *Bronson*, 500 U.S. 136 (1991), and *Train* v. *Colorado Pub. Interest Research Group*, 426 U.S. 1 (1976).

conditions, it would be incongruous to provide employees with up to six years of inflated payments based on additional overtime received only because of the merger transaction itself; this would turn the notion of "compensation" on its head.

The Commission's interpretation of section 5(a) thus eliminates a basic tension in the *New York Dock* conditions as applied to the situation at issue. Cf. *Wallace* v. *CAB*, 755 F.2d 861, 865 (11th Cir. 1985). As the court of appeals recognized, where a literal application of one provision, considered in isolation, would "compel an odd result," courts must consider other evidence of the intent behind a provision. Pet. App. 13a (quoting *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454 (1989)). Here, the intent of section 5(a) to compensate displaced workers for merger-caused *harms*, reflected in the "context of the labor-protective conditions as a whole," Pet. App. 12a, and in "[t]he historical origins of railroad labor conditions," *id.* at 15a, supports rather than undermines the Commission's interpretation of section 5(a).

The court of appeals therefore correctly deferred to the Commission's interpretation on this specialized issue falling squarely "within the Commission's particular area of concern and expertise." *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993) (referring to Sentencing Commission). No other court of appeals decision, decision of this Court, or federal statute is to the contrary. There is no reason for this Court to examine this matter further.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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